

**PRUDENTIAL ASSURANCE MALAYSIA BHD v. OMBUDSMAN
PERKHIDMATAN KEWANGAN & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR

AHMAD KAMAL MD SHAHID J

[JUDICIAL REVIEW NO: WA-25-278-09-2020]

28 SEPTEMBER 2022

Abstract – (i) A judicial review application is found defective if the proper party is not cited; (ii) Where the applicant had fully admitted to the liability of an insurance claim and unconditionally complied with the adjudication and award by the Ombudsman, consequently the proceedings are academic and of no utility to the applicant; and (iii) It is not the task of the court to scrutinise every piece of evidence adduced before the Ombudsman and to make a finding of fact as the task of fact finding falls within the jurisdiction of the Ombudsman. When the Ombudsman's findings are found to be rational and cogent, appellate interference is not warranted.

ADMINISTRATIVE LAW: Judicial review – Application for – Application to quash adjudication and award allowing claim on insurance policy – Preliminary objections raised – Whether proper party cited – Whether insurance company fully admitted to liability of death claim – Whether current proceedings academic – Whether insurance company's reliance on general declaration in proposal form to avoid policy unequivocally abolished by para. 10 of sch. 9 of Financial Services Act 2013 – Whether decision of Ombudsman tainted with errors of law – Whether warranted intervention of court

On 20 April 2017, the deceased applied to the applicant for a life insurance policy *vide* a life insurance regular premium proposal form ('proposal form') which contained a general declaration. On 15 May 2017, the deceased attended a medical examination by one Dr Kheng Kien Soo for purposes of the proposal form. There was no detection of any symptom or condition of myasthenia. On 7 June 2017, the applicant accepted the deceased's proposal form and issued the deceased a letter bearing the offer of conditional acceptance dated 7 June 2017. The applicant offered the deceased, *inter alia*, death benefits of RM12,000 and add-on benefits, including medical benefits up to RM1,000,000. The offer of conditional acceptance was accepted by the deceased on 9 June 2017. Upon the deceased's acceptance of the offer of conditional acceptance, the policy with a commencement date of 1 June 2017 was issued on 13 June 2017, which provides for, *inter alia*, a monthly premium of RM848. Also, the second respondent was named as the nominee under the policy. On 30 August 2017, the deceased was, upon being

- A investigated, diagnosed by one Dr Christopher Chong to have myasthenia gravis. Thereafter, the deceased had also undergone several consultations and treatments until 20 June 2018. On 26 September 2018, the deceased passed away due to myasthenia gravis with respiratory failure. Upon the deceased's passing, the second respondent submitted a claim (death claim) on the policy
- B to the applicant together with a copy of the medical questionnaire completed by Dr Christopher Chong dated 9 January 2019. However, on 16 October 2019, the applicant rejected/repudiated the death claim and opted to void the policy. In rejecting the death claim, the applicant had purportedly claimed that the deceased had, prior to the issuance of the policy, committed non-disclosure of material fact in the proposal form and therefore, the applicant
- C was voiding the policy with the deceased and denying the death claim. The second respondent, being dissatisfied with the applicant's rejection, made a reference on the death claim to the first respondent. The case manager of the first respondent provided a recommendation in favour of the applicant ('recommendation'). Dissatisfied, the second respondent further referred the rejection of the death claim by the applicant ('dispute') to the first respondent for adjudication under the financial Ombudsman scheme ('adjudication'). Subsequently, the first respondent assigned the Ombudsman, one S Kalyana Kumar, to adjudicate the dispute. The Ombudsman issued a letter to the applicant stating his preliminary view that the applicant had no basis to repudiate the death claim on grounds of non-disclosure of the deceased's medical condition after signing the proposal form and prior to the policy's commencement date on 1 June 2017 due to sch. 9 of the Financial Services Act 2013 ('FSA') including para. 10. Subsequently, the Ombudsman concluded the adjudication and found in favour of the second respondent ('award'). The Ombudsman also directed the applicant to honour the death claim. Thereafter, the applicant admitted liability to the death claim of the policy and also provided a payment of RM15,482.04 to the second respondent. However, the applicant failed to provide the hospitalisation claim under the policy in the amount of RM121,695.93 to the second respondent. The first respondent issued a letter to the applicant enquiring and seeking for an explanation for the applicant's failure to provide the hospitalisation claim to the second respondent. The applicant filed an application for judicial review proceedings (encl. 13) under O. 53 of the Rules of Court 2012 ('ROC') to seek (i) a declaration that the second respondent's claim on the policy was not payable by the applicant; and
- H (ii) an order of *certiorari* to remove the proceedings before the first respondent to this court to quash the adjudication by the first respondent that allowed the second respondent's claim on the policy. At the outset of the hearing, the first respondent raised a preliminary objection premised on the following grounds: (i) the adjudication and the award were rendered by the
- I Ombudsman, and not the first respondent. Accordingly, this judicial review

application was defective as the proper party was not cited; and (ii) the applicant had fully admitted to the liability of the death claim and unconditionally complied with the adjudication and the award, and consequently the current proceedings were academic and of no utility to the applicant. The issues that also arose in this case were: (i) whether the applicant's reliance on the 'general declaration' in the proposal form to avoid the policy had been unequivocally abolished by para. 10 of sch. 9 of the FSA; (ii) whether the practice of requiring a consumer to confirm his health condition through a declaration in the proposal form would be in direct conflict with the pre-contractual duty of disclosure under para. 10 of sch. 9 of the FSA; (iii) whether the Ombudsman had erred in law in failing to appreciate and/or adequately appreciate that para. 10 of sch. 9 of the FSA concerning representation made at the pre-contractual stage; and (iv) whether the Ombudsman had erred in law in concluding that there was no misrepresentation on the part of the deceased prior to the issuance of the policy.

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Held (dismissing application for judicial review):

- (1) The first respondent was only the operator of the financial Ombudsman scheme, whereas the Ombudsman was appointed by the board of the first respondent to adjudicate the disputes. The application was brought against the wrong party as the first respondent named in this application was not the party who adjudicated the disputes as the party responsible for the adjudication was the Ombudsman, one S Kalyana Kumar. The applicant must correctly identify the party responsible for adjudication because the applicant could not seek for a declaratory order and a *certiorari* order to quash the adjudication of the Ombudsman, who was not named as a party. This judicial review application was therefore defective and incompetent and ought to be struck out (paras 41, 42, 45 & 51).
- (2) The applicant had unequivocally admitted liability to the second respondent's death claim or claim on the policy, which was the subject matter of the adjudication by the Ombudsman. Therefore, this judicial review application was academic. Thus, the preliminary objection raised by the first respondent had merits and accordingly, the first respondent's objection was upheld. (paras 53 & 59)
- (3) Based on the evidence produced before the Ombudsman, the Ombudsman had correctly found, among others that (i) there was no misrepresentation on the part of the deceased as to her state of health in the proposal form of 20 April 2017; (ii) the deceased was only diagnosed with myasthenia on 30 August 2017, which was after the commencement date of the policy on 1 June 2017. The deceased had no

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- A knowledge of myasthenia until the doctor diagnosed it on 30 August 2017. As such, the deceased had no duty to inform of any change in her health prior to the commencement of the policy; (iii) the applicant could not rely on the 'general declaration' in the proposal form to avoid the deceased's policy due to para. 10 of sch. 9 of the FSA which had unequivocally abolished the practice or use of basis clauses; and (iv) the applicant's practice of requiring a consumer to confirm his or her health condition through a general declaration in the proposal form would be in direct conflict with the pre-contractual duty of disclosure and remedies under sch. 9 of the FSA. All in all, the Ombudsman's adjudication was reasonable, and based on applicable legal principles. (paras 88 & 89)
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- (4) The Ombudsman's findings were rational and cogent, and there were no flaws in its reasoning or the conclusions therein. It could not be said that the findings of the Ombudsman were irrational or perverse. The finding of the Ombudsman was based on the totality of the evidence adduced before him. The Ombudsman had scrutinised the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It was not the task of this court to scrutinise every piece of evidence adduced before the Ombudsman and to make another finding of fact. The tasks of fact-finding fell within the jurisdiction of the Ombudsman. (paras 93 & 94)
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Case(s) referred to:

- Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77 CA (*refd*)
- F *Ambiga Sreenivasan v. Ketua Pengarah Imigresen, Malaysia & Ors* [2012] 7 CLJ 170 HC (*refd*)
- Council Of Civil Service Unions & Ors (CCSU) v. Minister For The Civil Service* [1985] AC 374 (*refd*)
- Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 FC (*refd*)
- G *Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd* [1970] 1 LNS 78 HC (*refd*)
- Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 CA (*refd*)

Legislation referred to:

- H Financial Services Act 2013, s. 126, Schedule 9 paras 3, 5(1), 6, 9, 10
- Insurance Act 1996, s. 150
- Rules of Court 2012, O. 53
- For the applicant - Wong Hok Mun & Eng Kar Wei; M/s Azim Tunku Farik & Wong*
For the 1st respondent - Khoo Guan Huat & Joshua Teoh; M/s Skrine
- I *Reported by Suhainah Wahiduddin*

JUDGMENT

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Ahmad Kamal Md Shahid J:**Introduction**

[1] The applicant filed an application for judicial review proceedings (encl. 13) under O. 53 of the Rules of Court 2012 (ROC) to seek the following reliefs:

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- (i) a declaration that the second respondent's claim on the policy is not payable by the applicant;
- (ii) an order of *certiorari* to remove the proceedings before the first respondent to this Honourable Court to quash the adjudication by the first respondent dated 29 June 2020, that allowed the second respondent's claim on the policy;
- (iii) all necessary and consequential orders or directions, as deemed fit by this Honourable Court; and
- (iv) the costs of this application and costs occasioned thereby be costs in the cause.

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[2] In gist, the applicant's judicial review application among others is on the adjudication and award rendered by the Ombudsman, one S Kalyana Kumar (the Ombudsman) or a dispute between the applicant and the second respondent on the rejection of a claim made under the life insurance policy No. 35294124 (the policy) taken up by one Ms Kok Sok Fui (the deceased) with the applicant.

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[3] The Ombudsman's adjudication was made according to the Financial Ombudsman Scheme operated by the first respondent under s. 126 of the Financial Services Act 2013 (FSA), the Financial Services (Financial Ombudsman Scheme) Regulations 2015 and the terms of reference for the Ombudsman for Financial Services (the terms of reference).

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[4] After the hearing, I dismissed the applicant's application for judicial review (encl. 13). The grounds for my decision appear below.

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Background Facts

[5] The narration of the background facts herein is adopted with and/or without modification from the written submission of the first respondent.

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The Policy

[6] On or about 20 April 2017, the deceased applied to the applicant for a life insurance policy *vide* a life insurance regular premium proposal form (proposal form) which contained a general declaration.

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- A [7] On 15 May 2017, the deceased attended a medical examination by one Dr Kheng Kien Soo for purposes of the proposal form. There was no detection of any symptom or condition of myasthenia.
- B [8] On 17 May 2017, the deceased consulted Dr Christopher Chong. However, she was not afforded any investigation and treatment/medication for myasthenia.
- [9] On 7 June 2017, the applicant accepted the deceased's proposal form and issued the deceased a letter bearing the offer of conditional acceptance dated 7 June 2017. The applicant has offered the deceased, *inter alia*:
- C (i) death benefits of RM12,000;
(ii) add-on benefits, including medical benefits up to RM1,000,000.
- [10] The offer of conditional acceptance dated 7 June 2017 was accepted by the deceased on 9 June 2017.
- D [11] Upon the deceased's acceptance of the offer of conditional acceptance, the policy with a commencement date of 1 June 2017 was issued on 13 June 2017 which provides for, *inter alia*, a monthly premium of RM848. Also, the second respondent was named as the nominee under the policy.
- E [12] On 30 August 2017, the deceased was, upon being investigated, diagnosed by one Dr Christopher Chong to have myasthenia gravis. Thereafter, the deceased has also undergone several consultations and treatments with Dr Christopher Chong until 20 June 2018.
- F [13] On 25 September 2018, the deceased passed away due to myasthenia, gravis with respiratory failure.
- [14] Upon the deceased's passing, the second respondent submitted a claim (death claim) on the policy to the applicant together with a copy of the medical questionnaire completed by Dr Christopher Chong dated 9 January 2019.
- G [15] However, on 16 October 2019, the applicant rejected/repudiated the death claim and opted to void the policy through a letter dated 16 October 2019 to the second respondent.
- H [16] In rejecting the death claim, the applicant has purportedly claimed that the deceased has, prior to the issuance of the policy, committed non-disclosure of material fact in the proposal form, especially about her answers to the questions in Q3.5a, Q3.5b, Q3.6a and Q3.6c and therefore, the applicant is voiding the policy with the deceased and denying the death claim.
- I [17] On or about 8 November 2019, the second respondent, being dissatisfied with the applicant's rejection of 16 October 2019, made a reference on the death claim to the first respondent.

- [18] On 1 May 2020, the case manager of the first respondent, Masni Sulaiman, provided a recommendation in favour of the applicant (the recommendation). A
- [19] Being dissatisfied with the recommendation, the second respondent further referred the rejection of the death claim by the applicant (the dispute) to the first respondent for adjudication under the Financial Ombudsman Scheme (the adjudication). B
- [20] Subsequently, the first respondent has assigned the Ombudsman, one S Kalyana Kumar, to adjudicate the dispute.
- [21] On 20 May 2020, the Ombudsman issued a letter to the applicant informing that the second respondent has referred the dispute for adjudication and inviting the applicant to provide information and/or documents for the adjudication. C
- [22] On 22 May 2020, the Ombudsman further issued a letter to the applicant stating his preliminary view that the applicant has no basis to repudiate the death claim on grounds of non-disclosure of the deceased's medical condition after signing the proposal form and prior to the policy's commencement date on 1 June 2017 due to Schedule 9 of the FSA including para. 10. D
- [23] On 3 June 2020, the applicant through a letter responded to the Ombudsman, and provided the Ombudsman eight documents for evaluation in the adjudication. E
- [24] With Schedule 9 of the FSA in mind, the issue for determination by the Ombudsman in the adjudication was whether there was misrepresentation by the deceased prior to the commencement of the policy. F
- [25] On 29 June 2020, the Ombudsman concluded the adjudication and found in favour of the second respondent (the award). The Ombudsman also directed the applicant to honour the death claim.
- [26] Thereafter, in a letter dated 28 July 2020 addressed to the second respondent, the applicant has admitted liability to the death claim of the policy. The applicant has also provided a payment of RM15,482.04 to the second respondent. G
- [27] However, it was brought to the first respondent's attention that the applicant has failed to provide the hospitalisation claim under the policy in the amount of RM121,695.93 to the second respondent. H
- [28] On 6 August 2020, the case manager of the first respondent, Masni Sulaiman, issued a letter to the applicant enquiring and seeking for an explanation for the applicant's failure to provide the hospitalisation claim to the second respondent. I

A [29] On 28 September 2020, the applicant has, without naming the Ombudsman, applied to this Honourable Court leave to commence a judicial review application against the adjudication.

[30] Thereafter, leave to proceed with the judicial review application was granted by this Honourable Court on 23 November 2020.

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The Applicant's Ground For The Judicial Review

[31] In gist, the applicant's application herein is based on the following grounds:

- C (i) the first respondent committed an error of law, acted in excess of jurisdiction and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense in concluding that the applicant's reliance on the "general declaration" in the proposal form to avoid the policy has been unequivocally abolished by para. 10 of Schedule 9 of the FSA;
- D (ii) the first respondent committed an error of law, acted in excess of jurisdiction and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense in concluding that the practice of requiring a consumer to confirm his health condition through a declaration in the proposal form would be in direct conflict with the pre-contractual duty of disclosure under para. 10 of Schedule 9 of the FSA;
- E (iii) the first respondent's adjudication is an error of law and is irrational and/or unreasonable in the *Wednesbury* sense in that he held that para. 10 Schedule 9 of the FSA has the effect of nullifying the nature of insurance contract from being *uberrimae fidei*;
- F (iv) the first respondent committed an error of law, acted in excess of jurisdiction and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense when it failed to appreciate and/or adequately appreciate that para. 10 of Schedule 9 of the FSA merely provides that any representation made at the pre-contractual stage will remain as a representation and be treated so. It does not "abolish" a party's reliance on the general declaration made by the other whatsoever;
- G (v) the first respondent committed an error of law, acted in excess of jurisdiction and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense in concluding that there is no misrepresentation on the part of the deceased prior to the applicant's issuance of the policy. In so concluding, the first respondent failed to take into account the following:
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- (a) the deceased's complaint of "droopy eyelids" as well as the diagnosis of "suspected myasthenia" on 17 May 2017 amounts to a change in the state of her health required to be disclosed prior to the applicant before the issuance of the policy; A
- (b) the deceased's condition ought to be disclosed to the applicant prior to the issuance of the policy in light of questions 3.5, 3.6(a) and 3.6(b) of the proposal form; and? B
- (c) the deceased's failure to disclose the condition amounts to a deliberate and/or reckless misrepresentation.
- (vi) the first respondent committed an error of law, acted in excess of jurisdiction under para. 30 of the TOR and made a decision that was in any event irrational and/or unreasonable in the *Wednesbury* sense in concluding that he had the power to decide each case according to what is "fair and reasonable" without regard the relevant applicable law; and C
- (vii) the adjudication by the first respondent is unreasonable in law in that no other person or tribunal similarity circumstanced would have arrived at it. D

The Law

[32] Judicial review is generally concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety. E

[33] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance. F

[34] It is settled law that the High Court will not interfere with a decision of the inferior tribunal unless it can be established that the decision is infected with errors of law. G

[35] The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 1 MLR A 268; [1995] 2 AMR 1601; [1995] 2 MLJ 317 in the following words:

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an anisimic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law. H
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(emphasis added)

A [36] Similarly, in the case of *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77; [2000] 1 MLRA 664, the Court of Appeal held that an erroneous inference of facts is also an error of law which would warrant an order of *certiorari*:

B On the other hand, we accept, of course, that it is entirely competent for the High Court in *certiorari* proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. **An erroneous inference from proved or admitted facts is an error of law; not an error of fact.**

C (emphasis added)

[37] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the first respondent had, among others:

- D (i) asked itself the wrong questions;
- (ii) considered irrelevant matters;
- (iii) failed to consider relevant matters;
- E (iv) failed to apply the proper principle(s) of law; and/or
- (v) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

Preliminary Objection (PO)

F [38] At the outset of the hearing, learned counsel for the first respondent raised a PO. The PO was premised on the following grounds:

- (i) the adjudication and the award were rendered by one S Kalyana Kumar as the Ombudsman, and not the first respondent. Accordingly, this judicial review application is defective as the proper party is not cited;
- G (ii) The applicant has fully admitted to the liability of the death claim and unconditionally complied with the adjudication and the award, and consequently, the current proceedings are academic and of no utility to the applicant.

H The Decision Of The Court

Preliminary Objection

The Judicial Review Application Is Defective As The Proper Party *ie*, The Ombudsman, Was Not Named

I [39] The first respondent submits that the current judicial review proceedings are defective as the party responsible for the adjudication *ie*, the Ombudsman, is not cited as a party.

[40] Having perused the award, I find that the subject matter concerned an adjudication that was rendered by the Ombudsman, one S Kalyana Kumar who is not named as a party. A

[41] It is my view that this judicial review application is defective as the person who is responsible for the adjudication *ie*, the Ombudsman is not cited as a party. B

[42] I find that the first respondent is only the operator of the Financial Ombudsman Scheme, whereas the Ombudsman was appointed by the Board of the first respondent to adjudicate disputes.

[43] This is because para. 2 of the terms of reference which regulates the adjudication states that: C

“adjudication” means the process where the Ombudsman adjudicates a Dispute and makes a final decision, including an Award in accordance with these terms of reference.

“Ombudsman for Financial Services” or “OFS” means the scheme operator approved by the Bank Negara Malaysia to operate the financial Ombudsman scheme. D

“Ombudsman” means an officer of the OFS appointed by the Board to adjudicate Disputes. E

[44] Further, para. 6 of the terms of reference provides that: F

An Ombudsman shall exercise all powers, duties and responsibilities in accordance with the Articles of Association, the FOS Regulations and these Terms of Reference, **including adjudicating and making a final decision on a Dispute.** F

(emphasis added)

[45] Based on the above, I am of the considered opinion that the application was brought against the wrong party as the first respondent named in this application was not the party who adjudicate the disputes as the party responsible for the adjudication is the Ombudsman, one S Kalyana Kumar. G

[46] It is my view that the applicant must correctly identify the party responsible for adjudication because the applicant cannot seek for a declaratory order and a *certiorari* order to quash the adjudication of the Ombudsman, who is not named as a party. H

[47] In the case of *Council Of Civil Service Unions & Ors (CCSU) v. Minister For The Civil Service* [1985] AC 374 at 408, Lord Diplock held that:

The subject matter of every judicial review is a decision made by some person or (body of persons) whom I shall call the decision maker or else a refusal by him to make a decision. I

- A [48] In the case of *Ambiga Sreenevasan v. Ketua Pengarah Imigresen, Malaysia & Ors* [2012] 7 CLJ 170; [2011] 9 MLRH 572; [2012] 1 MLJ 92 at 100, Rohana Yusuf J (now PCA) held as follows:

[12] Thus, since the first respondent and third respondent are not decision makers of the impugned decision, judicial review cannot lie against them.

- B To put it differently, **there is no decision by the first and second respondents that is before this court to review. On this ground, alone, the application ought to be struck out.**

(emphasis added)

- C [49] Further, the Federal Court in the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 1 MLRA 336; [1999] 3 MLJ 1; [1999] 3 AMR 3529 held that:

It is right to say, at the risk of being trite, that administrative law is much concerned with the legality of procedures leading up to a decision and, of course, of the decision itself. **It is therefore a matter of the first importance to correctly identify the decision sought to be impugned.**

- D Furthermore, when the date on which a decision is made is important, it may be necessary to know which of a series of acts constituted the effective decision for the purpose of the scheme in question. The same is true where statute allows an appeal to be brought from a decision.
- E **Failure to observe these basic requirements could have fatal consequences** as the following authorities will serve to illustrate.

(emphasis added)

- F [50] Coming back to the facts in the present case, based on the award of the adjudication, it is clear that it was the Ombudsman, one S Kalyana Kumar who is conducting the adjudication and not the first respondent.

[51] Therefore, based on the above, I am of the view that the applicant's application for judicial review is incompetent and based on this ground alone, the application ought to be struck out.

- G The Judicial Review Application Is Academic As The Applicant Has Admitted Liability To The Death Claim

- H [52] Upon perusal of the applicant's letter to the second respondent dated 28 July 2020 as exhibited in exh. 'MB-1' of the first respondent's affidavit, it is clear that the applicant has admitted liability to the death claim made by the second respondent under the policy. The said letter dated 28 July 2020 is reproduced for ease of reference:

- I THIEN SHING YI
LOT NO 1, LUYANG PHASE 7
JALAN KOLAM
88300 KOTA KINABALU SABAH

Our Ref : Claims/18326444/2007008903 28/07/2020
Date :

Dear Sir/Madam,

Policy Number : 35294124
Claim Number : 18326444
Assured : Kok Sok Fui (deceased)
Life Assured : Kok Sok Fui
Nric Number : 510124125244

Death Claim

We would like to thank you for submitting the necessary documents in respect of the above claim.

We are pleased to inform that we have admitted liability on this claim.
The amount of benefit payable is as follows:

(emphasis added)

[53] Based on the above, it is clear that the applicant has unequivocally admitted liability to the second respondent's death claim or claim on the policy, which is the subject matter of the adjudication by the Ombudsman. Therefore, it is my view that this judicial review application is academic.

[54] In the applicant's submissions, the applicant has purported claim in para. 10.7 that:

- (i) the letter dated 28 July 2020 was inadvertently sent out in its templated/ auto-generated for the claims system;
- (ii) there was never any intention to admit the death claim; and
- (iii) the letter dated 28 July 2020 was sent before legal advice was taken.

[55] It is my view that the applicant's claim in para. 10.7 is nothing but an afterthought effort to resile on its clear admission of liability. This is because at all material times, the applicant has failed to mention or address its admission in the letter dated 28 July 2020 to the second respondent.

[56] I find that the applicant has only shifted its position on the letter dated 28 July 2020 after it received the first respondent's affidavit with, among others, a preliminary objection to the judicial review proceedings to the applicant's admission on liability to the death claim.

[57] Consequent to the letter dated 28 July 2020, the second respondent relied on the applicant's admission when she wrote to the first respondent on 13 August 2020 to inform that among others, the applicant has failed to provide all the benefits due under the policy.

[58] Therefore, I am of the considered view that the applicant's last-minute shift from its clear admission in the letter dated 28 July 2020 to the second respondent has no merits. The applicant is estopped by its clear admission to liability on the death claim.

(See *Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd* [1970] 1 LNS 78; [1970] 2 MLJ 111; [1970] 1 MLRA 475)

- A [59] Premised on the aforesaid reasons, I find that the PO raised by the first respondent has merits and accordingly, I uphold the first respondent's objection. However, for completeness, I will now deal with the merits of the application.

Merits

- B [60] It is to be noted that since grounds 1, 2, 3 and 4 of the judicial review concerned the pre-contractual representation in the 'general declaration' of the proposal form, reference must be made to relevant provisions of law as follows:

- C (a) Section 129 of the FSA provides that:

Pre-contractual disclosure and representations, and remedies for misrepresentations

- D 129. (1) Schedule 9 sets out the pre-contractual duty of disclosure and representations for contracts of insurance in Part 2, and the remedies for misrepresentations relating to contracts of insurance in Part 3.

- E (2) Any person who contravenes the duty of disclosure under para. 11 of Schedule 9 commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.

[61] Further, para. 3 of Schedule 9 of the FSA prohibits any attempt to contract out of Schedule 9 as follows:

Contracting out

- F 3. (1) A term of a consumer insurance contract, or of any other contract, is rendered void to the extent that it would put the consumer in a worse position in respect of the matters mentioned in subparagraph (2) than he would be in by virtue of the provisions of this Schedule.

(2) The matters referred to in subparagraph (1) are:

- G (a) **disclosure and representations by the consumer to the licensed insurer before the contract is entered into, varied or renewed;** and
(b) the non-contestability of contracts of life insurance and any of the remedies for consumer insurance contracts provided in Part 3 of this Schedule.

- H (3) This paragraph does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

(emphasis added)

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[62] Paragraph 5 of Schedule 9 of the FSA provides for the pre-contractual duty of disclosure for consumer insurance contracts as follows: A

Pre-contractual duty of disclosure for consumer insurance contracts

5. (1) Before a consumer insurance contract is entered into or varied, a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied. B

(2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subparagraph (1). ... C

(5) If the licensed insurer does not make a request in accordance with subparagraph (1) or (3) as the case may be, compliance with the consumer's duty of disclosure in respect of those subparagraphs, shall be deemed to have been waived by the insurer.

(6) Where the consumer fails to answer or gives an incomplete or irrelevant answer to any request by the licensed insurer under subparagraph (1) or subparagraph (3)(a), or fails to confirm or amend any matter under subparagraph (3)(b), or does so incompletely or provides irrelevant information, as the case may be, and the answer or matter was not pursued further by the insurer, compliance with the consumer's duty of disclosure in respect of the answer or matter shall be deemed to have been waived by the insurer. D E

(7) A licensed insurer shall, before a consumer insurance contract is entered into, varied or renewed, clearly inform the consumer in writing of the consumer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed. F

(8) Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied. G

(9) Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

(emphasis added) H

[63] As to the consumer's duty to take reasonable care, para. 6 of Schedule 9 of the FSA provides as follows:

Duty to take reasonable care

6. (1) In determining whether a consumer has taken reasonable care not to make a misrepresentation under subparagraph 5(2) or (4), the relevant circumstances may be taken into account including: I

- A (a) the consumer insurance contract in question and the manner in which the contract was sold to the consumer;
- (b) any relevant explanatory material or publicity produced or authorised by the licensed insurer; and
- B (c) how clear and specific, the licensed insurer's questions were.

(2) Subject to subparagraph (3), the standard of care required of the consumer under subparagraph 5(2) and (4) shall be what a reasonable consumer in the circumstances would have known.

C (3) if the licensed insurer was, or ought to have been, aware of any particular characteristics or circumstances of the consumer, the insurer shall take into account such characteristics or circumstances.

[64] As to any representation made prior to an insurance contract, para. 10 of Schedule 9 of the FSA states that:

Warranties and representations

- D 10. Any representation made before a consumer insurance contract was entered into, varied or renewed shall not be converted into a warranty by means of any provision of the consumer insurance contract or of any terms of the variation or of any other contract, **whether by declaring the representation to form the basis of the contract or otherwise.**

E (emphasis added)

[65] Based on the above provisions of the law, I will now deal with the applicant's grounds of the judicial review.

Grounds Of Judicial Review

- F *Ground 1 – The Ombudsman Has Erred In Law In Concluding That The Applicant's Reliance On The "General Declaration" In The Proposal Form To Avoid The Policy Has Been Unequivocally Abolished By Para. 10 Of Schedule 9 Of The FSA.*

G [66] It is to be noted that before the coming into force of Schedule 9 of the FSA, *ie*, 1 January 2015, it is permitted for an insurer to rely based on contract clauses to avoid a policy when any of the pre-contractual representations provided by the insured was found to be inaccurate.

H [67] Under a basis of contract clause, a person who applies for an insurance contract warrants the accuracy of their answers on the proposal form and agrees that such answers will form the basis of the contract.

I [68] However, due to the repeal of the Insurance Act 1996 and the introduction of para. 10 of Schedule 9 of the FSA, the use of the basis of contract clauses to avoid insurance policy for inaccurate representations has effectively been abolished.

[69] Having perused Schedule 9 of the FSA, I find that it provides that even if there is misrepresentation by the insured towards the specific questions by an insurer at the pre-contractual stage, it is not automatic for the insurer to avoid the entire policy as there are remedies provided, depending on the type of misrepresentation, in Schedule 9.

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[70] Therefore, applying Schedule 9 of the FSA to the policy, I am of the view that the Ombudsman has correctly observed that the applicant cannot use the representations made by the deceased in the proposal form to avoid the policy as though these representations are warranties forming the basis clauses of the contract for the policy. This is because such practice conflicts with Schedule 9.

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[71] I view that the Ombudsman's observation concerning the applicant's attempt to avoid the policy by using the deceased's representations in the "general declaration" of the proposal form through its letter dated 29 October 2019 to the second respondent is rational and/or reasonable. There is no error of law committed by the Ombudsman.

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Ground 2 – The Ombudsman Has Erred In Law In Concluding That The Practice Of Requiring A Consumer To Confirm His Health Condition Through A Declaration In The Proposal Form Would Be In Direct Conflict With The Pre-contractual Duty Of Disclosure Under Para. 10 Of Schedule 9 Of FSA.

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[72] On this issue, I find that the observation made by the Ombudsman is consistent with Schedule 9.

[73] This can be gleaned in para. 4(iii) of the grounds of adjudication where the Ombudsman observed as follows:

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(iii) We also note that the Insurer is relying on the "General Declaration" in the proposal form to void the policy. In this respect it is important to note that pursuant to para. 10 of Schedule 9, any misrepresentation made at the pre-contractual stage cannot be converted into a warranty in that the misrepresentation becomes the basis of the contract which would allow the Insurer to then avoid the contract. The use of basis clauses has been abolished by para. 10. As such, the practice of requiring the consumer to confirm his health condition through a declaration in the proposal form would be in direct conflict with pre-contractual duty of disclosure and remedies under Schedule 9. Such declarations are invalid and of no effect any longer with the coming into force of Schedule 9.

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[74] Based on the above, it clearly shows that the Ombudsman's sentence that the "practice or requiring a consumer to confirm his health condition through a declaration in the proposal form would be in direct conflict with the pre-contractual duty of disclosure under para. 10 of Schedule 9" was made about the context of the abolishment of the use of basis clauses. The applicant cannot discount the use of the words "As such" at the start of the sentence, as these words would provide the correct context as to the abolishment of the use of pre-contractual representations as basis clauses.

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- A *Ground 3 – The Ombudsman Has Erred In Law In Concluding That Para. 10 Schedule 9 Of FSA Has The Effect Of Nullifying The Nature Of Insurance Of Contract From Being Uberrimae Fide.*

[75] Upon perusal of the grounds of the adjudication, I find that nowhere in his grounds did the Ombudsman conclude that para. 10 of the Schedule 9 has the effect of nullifying the nature of the insurance contract from being *uberrimae fidei*.

- B [76] Therefore, I view the applicant’s contention on ground 3 as untenable and devoid of merits.

- C *Ground 4 - The Ombudsman Has Erred In Law In Failing To Appreciate And/ Or Adequately Appreciate That Para. 10 Of Schedule 9 Of The FSA Concerning Representation Made At The Pre-contractual Stage*

[77] Paragraph 10 of Schedule 9 states that:

- D **Warranties and representations**

10. **Any representation made before a consumer insurance contract was entered into, varied or renewed shall not be converted into a warranty** by means of any provision of the consumer insurance contract or of any terms of the variation or of any other contract, **whether by declaring the representation to form the basis of the contract or otherwise.**

- E (emphasis added)

[78] Based on the above, I see no reason why the applicant claim that para. 10 merely provides that any representation made at the pre-contractual stage will remain as a representation when in fact, it is also obvious that para. 10 excludes any such representation from being converted into a warranty which would form the basis of the insurance contract.

- F [79] Therefore, based on para. 10 of Schedule 9 above, I am of the view that the Ombudsman has correctly observed that it has abolished the use of pre-contractual representations as basis clauses by insurers to avoid a policy. This would necessarily mean that in this case, the applicant’s attempt to use the deceased’s representations in the “general declaration” of the proposal form to avoid the policy would be in conflict with Schedule 9 and is no longer permissible.

- G *Ground 5 - The Ombudsman Has Erred In Law In Concluding That There Is No Misrepresentation On The Part Of The Deceased Prior To The Issuance Of The Policy*

- H [80] On this issue, I find that the applicant has conflated the pre-contractual duty to take reasonable care not to make misrepresentation under para. 5 of Schedule 9 with the previous duty of disclosure under s. 150 of the Insurance Act 1996 (repealed).

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[81] Having read para. 5(1) of Schedule 9, I find that the deceased is not obliged to volunteer any information. Instead, the deceased is only required to take reasonable care not to make misrepresentation when answering the specific question posted by the applicant. In other words, the deceased is only required to answer the specific question when posted by the applicant to comply with the pre-contractual duty of disclosure.

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[82] In the proposal form or at any time up till the commencement date of the policy, there was no request from the applicant to the deceased to provide an answer to any specific question on the diagnosis for myasthenia. By failing to do so, the applicant could be deemed to have waived the deceased's compliance with the pre-contractual duty of disclosure under Schedule 9 for the diagnosis of myasthenia.

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[83] It is also not in dispute that when the deceased provided her answer to the questions in the proposal form up until the commencement of the policy, there is nothing to show that she was investigated and diagnosed with myasthenia.

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[84] Therefore, the deceased would not have reasonably known of any myasthenia diagnosis and therefore, I view that there is no misrepresentation by the deceased when filing up proposal form on 20 April 2017.

[85] Further, I also noticed that the medical examination by one Dr Kheng Kien Soo on 15 May 2017 also did not detect or diagnose any symptom or condition of myasthenia in the deceased.

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[86] Even though, I find that the consultation with Dr Christopher Chong (Chris Chong or Chong Kang Tzrd) on 17 May 2017 has recorded that the deceased is "suspected" to have myasthenia. However, his report also unequivocally showed that there was no investigation done and no treatment/medication provided to the deceased about that suspicion.

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[87] Therefore, based on the above, I am of the considered view that a "suspected myasthenia" purported diagnosis is not a conclusive diagnosis. Furthermore, the suspicion by the doctor is, at most, limited to only the deceased's eyelids. There is nothing to show that the deceased has any issue or complaint with her respiratory system or breathing discomfort from 17 May 2017 up until the commencement of the policy (1 June 2017). The cause of the deceased's death was later found to be "septic shock" due to "myasthenia gravis with respiratory failure".

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[88] Based on the evidence produced before the Ombudsman, I find that the Ombudsman has correctly found, among others, that:

- (i) there was no misrepresentation on the part of the deceased as to her state of health in the proposal form of 20 April 2017;

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- A (ii) the deceased was only diagnosed with myasthenia on 30 August 2017, which was after the commencement date of the policy on 1 June 2017. The deceased had no knowledge of myasthenia until the doctor diagnosed it on 30 August 2017. As such, the deceased has no duty to inform of any change in her health prior to commencement of the policy.
- B (iii) the applicant cannot rely on the “general declaration” in the proposal form to avoid the deceased’s policy due to para. 10 of Schedule 9 of the FSA which has unequivocally abolished the practice or use of basis clauses; and
- C (iv) the applicant’s practice of requiring a consumer to confirm his or her health condition through a general declaration in the proposal form would be in direct conflict with the pre-contractual duty of disclosure and remedies under Schedule 9 of the FSA.
- D [89] All in all, I find that the Ombudsman’s adjudication is reasonable, and based on applicable legal principles. The Ombudsman has complied with, among others, para. 30 of the terms of reference in delivering the award.
- E [90] It is to be noted that the Ombudsman had made a finding of fact in the adjudication that there was no misrepresentation by the deceased in answering questions raised by the applicant in the proposal form prior to the commencement of the policy.
- [91] The Ombudsman has all the relevant and contemporaneous documents to draw a reasonable inference from them.
- F [92] The finding of facts of the Ombudsman will only be disturbed by this court when the Ombudsman was wrong in the evaluation of the evidence. It is for the applicant to establish that there was a misdirection by the Ombudsman to warrant interference by this court. Unfortunately, the applicant has not demonstrated any such errors in the facts of this case to warrant appellate interference
- G [93] I view the Ombudsman’s findings as rational and cogent and there are no flaws in its reasoning or the conclusions therein. Based on the evidence before the Ombudsman, it cannot be said that the findings of the Ombudsman are irrational or perverse.
- H [94] I am of the view that the finding of the Ombudsman is based on the totality of the evidence adduced before him. To me, the Ombudsman had scrutinised the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It is not the task of this court to scrutinise every piece of evidence adduced before the Ombudsman and to make another finding of fact. The tasks of fact-finding fall within the jurisdiction of the Ombudsman.
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Conclusion**A**

[95] Premised on the aforesaid reasons, I am of the view that the decision of the Ombudsman is not tainted with any errors of law, irrationality and/or unreasonableness that warrants the intervention of this court.

[96] As such, the applicant's application for judicial review (encl. 13) is dismissed with costs of RM5,000 subject to the allocator fee.

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